# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

### **ROCHESTER GAS & ELECTRIC CORPORATION**

and

Cases Nos. 03-CA-075635 03-CA-081230

# LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Aaron B. Sukert, Esq., for the Acting General Counsel.

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Binghamton, NY, for the Respondent.

James R. LaVaute and Brian J. LaClair, Esqs. (Blitman & King LLP),
Syracuse, NY, for the Charging Party.

## **DECISION**

#### Statement of the Case

**STEVEN DAVIS, Administrative Law Judge:** Based on charges and an amended charge filed by Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO (Union or Local 36) in Cases Nos. 03-CA-075635 and 03-CA-081230, a consolidated complaint was issued on September 28, 2012 against the Rochester Gas & Electric Corporation (Respondent or Employer).<sup>1</sup>

The complaint alleges essentially that during the term of a collective-bargaining agreement between the Respondent and the Union:

On about March 20, 2012, before which the Union did not know and could not have known, it was put on notice that at various times from about August 11, 2010 to about December 5, 2011, Respondent subcontracted bargaining unit work to the following contractors: Stanley M. Wright & Sons, Inc. [Wright]; Northline Utilities [Northline]; Premier Utility Services, LLC [Premier]; O'Connell Electric Company, Inc. [O'Connell]; Michels Power [Michels]; Power & Construction Group [Power & Construction]; and D & D Power [D & D].

On about August 30, 2011, Respondent subcontracted bargaining unit work to Health Consultants Incorporated [Heath].

The complaint further alleges that the Respondent's actions, set forth above, are mandatory subjects of bargaining, and that the Respondent took those actions without affording

<sup>&</sup>lt;sup>1</sup> The charge in Case No. 03-CA-075635 was filed on March 1, 2012. The charge and the amended charge in Case No. 03-CA-081230 were filed on May 17, and July 20, 2012, respectively.

the Union an opportunity to bargain with the Respondent as to the effects of such conduct on unit employees.

The complaint also alleges that since about August 29, 2011, the Union requested certain relevant information from the Respondent, and that the Respondent, from August 29, 2011 to March 20, 2012, unreasonably delayed in furnishing the union with the information it requested.

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On September 11, 2012, the Board issued a Revised Order denying the Respondent's Motion for partial dismissal of the complaint on the ground that the "Respondent has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law."

The Respondent's answer denied the material allegations of the complaint and set forth certain affirmative defenses which will be discussed below. On March 6-8, April 17-19, and May 13, 2013, a hearing was held before me in Buffalo, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties,<sup>2</sup> I make the following:

# **Findings of Fact**

# I. Jurisdiction and Labor Organization Status

The Respondent, a corporation, having its principal place of business at 89 East Avenue, Rochester, New York, has been engaged in the transmission, distribution, and sale of electricity and natural gas, and the limited generation of electricity though its hydro-electric facilities. Annually, the Respondent in conducting its business operations, derives gross revenues in excess of \$250,000, and purchases and receives at its Rochester, New York facility, goods valued in excess of \$50,000 directly from points outside the State of New York. This matter involves the Respondent's facility in Buffalo, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# **II. Alleged Unfair Labor Practices**

# A. Background

The Respondent's electric department employs people in four categories, those who (a) work on overhead construction and maintenance, working on poles and wires (b) work underground splicing cables, and who perform construction and maintenance work (c) perform trouble, maintenance and repair work and who respond to customer complaints for both overhead and underground systems, and (d) work in substations which reduce the high voltage received and transmit it in lower voltage to customers.

The Respondent's gas operations comprise six departments in which employees (a)

<sup>2</sup> Following the close of the hearing, the General Counsel filed a motion to reopen the record to admit Joint Exhibit 1, a chart created by him summarizing certain charts presented at the hearing. The Respondent and the Union had no objection to the receipt in evidence of this exhibit, and Joint Exhibit 1 is hereby received in evidence.

perform pressure control and odorization (b) do underground field inspections employing underground utility inspectors (UUI) who perform surveys to detect leaks and locate underground gas lines for contractors (c) do construction and maintenance by maintaining and repairing underground gas facilities including repairing leaks reported by customers (d) do commercial and industrial inspections (e) perform tapping and tie in and construction inspections and (f) read residential meters.

In April, 2003, the Union was certified as the collective-bargaining representative for all full-time and regular part-time employees in an appropriate unit consisting of employees employed in certain departments in the gas and electric departments of the Respondent which are set forth in the NLRB certification dated April 11, 2003, in Case No. 3-CB-11307, and excluding all other employees and all supervisors as defined in the National Labor Relations Act.

The Respondent and the Union entered into a collective-bargaining agreement which ran from 2003 to 2008, containing a broad management rights clause providing that the Respondent had the "sole and exclusive" right to subcontract work.

Thereafter, the parties entered into a collective-bargaining agreement which was effective from 2008 through 2013. The prior management rights clause was modified to, inter alia, eliminate the above provision. Both contracts contain the following provision concerning the subcontracting of work:

# Article 15. Subcontracting

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The employer may subcontract work performed by the classifications designated in NLRB Decision 3-RC-11307. An employee laid off during the term of this agreement from a classification within the bargaining unit shall be recalled if the Company contracts out work that is normally and customarily performed by the classification such employee was laid off from. In selecting contractors to perform work by the classifications designated in NLRB Decision 3-RC-11307, the Company will use reasonable efforts to secure contractors in good standing with the trades. Nothing herein shall require the Company to bear additional costs, to delay the work, or to violate Federal or State laws.

Michael Flanagan, the international union's representative, was the chief negotiator during the 2003 contract negotiations. He testified that during those discussions, Mark Corbitt, the Respondent's director of industrial relations, told him that the Respondent would discuss with the Union the effects of subcontracting. He said that Corbitt was not specific as to the topics to be discussed, but said that if subcontracting "was going to take place, we had the opportunity to propose anything that we thought may be able to get the work for our members and for their employees – safety was always an issue."

# B. The Procedure for Subcontracting and the Use of Subcontractors

For more than 30 years the Respondent had subcontracted unit work in its gas and electric operations, and Richard Irish, the Union's president/business manager, stated that beginning in late 2009 there was a significant increase in the use of subcontractors, and that practice continued through 2010 and 2011.

On August 2, 2010, the Union protested the Respondent's decision to subcontract certain work and, in addition, asserted its right to engage in effects bargaining "even if... the Company has the contractual right to engage in subcontracting unilaterally." At that time the Union made a request for information. The Union stated that it needed the information so that it could make effects bargaining proposals, and that through such information the Union would be able to determine how much work opportunity was being lost and the financial impact on employees of the lost work. Using that information, the Union could propose ways in which to ameliorate the financial aspect of the lost work. On December 2 and 8, 2010, the Union filed charges which contained the allegation that the Respondent failed to bargain about the effects of subcontracting on unit employees.

The issue before me is not whether the Respondent has validly subcontracted work, but whether it has subcontracted work without affording the Union an opportunity to bargain with the Respondent as to the effects of the subcontracting on unit employees.

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Richard Frank and Edward Pozzuolo, the Employer's managers of electric and gas operations, respectively, essentially testified that in deciding whether work should be performed by unit employees or subcontracted, they consider the amount of work to be done in comparison to the Respondent's compliance requirements and its resources. In other words, how much work can be performed by unit employees while at the same time ensuring that the Employer meets its required obligations pursuant to the New York Public Service Commission (NYPSC).

The following factors are considered in making the decision: public safety; meeting the mandated requirements imposed by the NYPSC; other work that must be done; and unit employees' availability including their vacation schedules and accident and sickness leave requirements. Such decisions are made by the MERCS committee which consists of Frank and Pozzuolo and managers from the marketing, engineering, real estate, construction and storage departments.

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Projects valued at less than \$250,000 are not subject to the bidding process. Rather, the Employer uses its agreements with the contractors which are already in effect for those "smaller" jobs.

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Projects over \$250,000 have to be bid on and are subcontracted. A proposed job is first designed by the Employer's engineering and design group. The job is then released by the procurement department in a request for proposals which are sent to potential contractors. The bids are sent to the procurement group which decides which entity will receive the job. A master service agreement is then prepared. Pursuant to this procedure, the managers are notified who is offered the bid and which subcontractor will be performing the work.

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A purchase order for each specific project is generated for the work to be performed. The managers approve the purchase orders which are sent to the contractor who then decides if it wants to do the work. If it does, the signed purchase order is returned to the Employer and the contractor performs the work. After the work is done, the contractor sends the Employer an invoice for the work.

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Frank testified that certain work has historically been exclusively performed by subcontractors although unit employees were qualified to do such work. Similarly, Pozzuolo conceded that certain subcontracted work, such as a highway project, could have been performed by unit employees who are qualified to do such work. Occasionally, the Respondent uses a "mix" of subcontractors and unit employees to perform work not done exclusively by

subcontractors, such as capital and operation and maintenance work.

On occasion, unit employees work on the same project with the subcontractor's employees. Frank decides, without consulting with the Union, whether and to what extent unit employees are utilized on such projects. He stated that his group never considered that, through such consultation, unit employees would receive more work through additional overtime or by rescheduling vacation periods. Frank conceded that if more unit employees were available they could be utilized to perform the work that was currently being subcontracted.

# C. The Subcontracting to Heath

The complaint alleges that on about August 30, 2011, the Respondent subcontracted bargaining unit work to Health without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

The Respondent's gas department unit employees perform gas walking surveys which consist of inspecting the gas infrastructure by using leak detectors to see if there are leaks in the system.

There are two types of gas walking surveys, both of which are done by the UUI. One is a "mandated" survey which the NYPSC requires be done of the entire gas system periodically, and which must be completed by December 31 of each year. The other type is an "incremental" or "nonmandated" survey which is a survey done beyond the requirements set by the NYPSC.

Pozzuolo stated that he and other managers at NYSEG and the Respondent decide how the work would be allocated between unit employees and subcontractors based on the historic performance of such work.

Richard Irish, a Union official, testified that an "open items meeting" was held on about April 14, 2011. At such meetings, the Respondent tells the Union of updates in its operations and current issues. Irish stated that at the meeting, Pozzuolo said that the mandated survey would be done by unit employees and the incremental survey would be performed by subcontractors.

Union official Irish stated that from April to August, 2011, the Respondent represented that unit employees would be performing the mandated surveys. Pozzuolo conceded that he told the Union that unit employees would be performing the mandated surveys. The Respondent had not done the incremental surveys before, and Pozzuolo decided that subcontractors would perform that work.

Pozzuolo testified that in about mid-August, 2011, he made the assessment that unit employees would not be able to complete the mandated survey by September 15 and then decided to employ Heath to perform that work. On about August 26, Pozzuolo told Irish that work on the mandated survey was "running behind," and in a phone call advised him that the Employer would not be able to comply with the deadline given to it by the NYPSC in completing the mandated survey. On August 30, Pozzuolo negotiated a pricing agreement with Heath for the mandated survey.<sup>3</sup>

<sup>3</sup> The original contract with Heath, which had been performing subcontracting services for the Respondent prior to this time, was entered into on April 11, 2011. There was no separate contract for its work on the mandated survey. Respondent and Heath agreed to a pricing

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Heath performed the mandated gas walking survey work from September 6, 2011 to October 15, 2011 in the towns of Brighton and Webster. For an overlapping period of time, from March 21, 2011 to November 28, 2011, the Respondent's employees performed mandated gas walking surveys in other cities.

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When Irish was informed that a subcontractor would be utilized, he objected and demanded "effects bargaining" on the decision to use subcontractors to perform the mandated survey, adding that "we have workers who could do the work on an overtime basis." Irish testified that effects bargaining that he sought related to (a) loss of overtime work by unit employees (b) safety concerns (c) the number of subcontractor employees performing unit work and (d) the training the subcontractor's employees received.

Pozzuolo testified that it was possible that the Respondent could have had its unit employees working more overtime on the mandated survey earlier in the year so that by August, work on the survey would have been progressing at a faster rate. But, he added, unit employees took many vacation hours in the summer and the Respondent was concerned about its budget cost for overtime hours.

Pozzuolo also stated that unit employees from other departments could have performed the mandated survey if they were "operator qualified." In fact, he maintained that some, but not all employees doing stakeout work were reassigned to do gas survey work after they finished their stakeout work for the day. He could not recall if other unit employees were given the opportunity to work overtime after their normal shift to perform the mandated survey work.

# D. The Request for Information

The complaint alleges that the Respondent unreasonably delayed in providing certain information to the Union.

On August 29, 2011, shortly after Pozzuolo's advise to Irish that the mandated survey would be subcontracted, Irish sent a letter to Jeffrey Shapiro, the Respondent's Director of Labor Relations, requesting certain information. Only certain information requested in the letter, paragraphs1, 5, and 6, are at issue here. They are set forth below:

As you know, the Company has an obligation to bargain with the Union over the effects on unit employees of the subcontracting of bargaining unit work. The Union demands effects bargaining over each instance of subcontracting of unit work. Such bargaining must by law take place in a meaningful manner and at a meaningful time, in advance of the particular subcontract. This means that in each instance of subcontracting, the Company must provide the Union, in advance of the starting date of the work, with written notice of the subcontract and an opportunity to bargain over effects.

With each such advance notification, the union will also require the following information, in detail, including copies of written documents, and with sufficient time for bargaining to take place. We view a minimum advance notification period of 30 days, with

arrangement for that work and the work proceeded according to the April, 2011 contract.

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the following information provided with the notification, as necessary to engage in meaningful bargaining. A longer advance notice period should be provided in cases involving complex or comprehensive decisions; it is the company's obligation to provide us with adequate time. The information that we will require for each instance, and the reasons why it will aid the union on effects bargaining, follow:

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1. The identity of the subcontractor; a description of the work to be subcontracted; its location; the time period of the subcontract, the hours during the day or night when the work will be done and the planned number of subcontractor employees who are to do the work. Also.

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a. A complete copy of the contract with the subcontractor that applies to the subcontract.

b. All communications from and to the subcontractor regarding the performance of the work.

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This information will aid the Union in ascertaining the scope of the subcontract so that the Union can assess the impact of the subcontract on the workload, hours and pay of affected unit employees.

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5. If the subcontracted work involves tasks for which unit employees have received special training or are required to have specified skills, identify such training and skills and specify what training and skills the employees of the subcontractor have who will be doing the work. This will be important for the union to assess safety concerns for the unit employees who will be working with or in proximity to the subcontractor's workers, or who will in the future be exposed to, or affected by, the actual work done by the subcontractor.

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6. Specify who will be supervising the employees of the subcontractor and managing the work, so that the Union can ascertain who in fact the employer of the subcontractors' workers is. The above noted safety implications are also a factor here.

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In any particular case, we may require additional information depending on the subcontract and the information that is initially provided as requested above.

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The Union will appreciate the Company's compliance.

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Irish and Jeffrey Sondervan, the current Union president, testified as to the reasons for the above request. The Union needed the information so that it could determine how the subcontracting would affect the number and working hours of unit employees. The Union would have proposed that unit workers perform the subcontracted work on an overtime basis. It needed to know the price of the contract in order to make proposals to persuade the Employer to provide overtime for such workers rather than subcontract the work. The information was necessary to explore staffing levels of unit employees inasmuch as there had been no hiring in

the skilled trades for 10 years.

The communications from and to the subcontractor was requested so that the Union could determine whether safety training was done, how the work was being performed and how long the Employer had been planning to subcontract the work. Safety training issues were of particular importance in determining whether unit employees, who may be called on to work with the subcontractor's employees, would be at risk in performing such work. The Union therefore needed to know the extent of the training of the subcontractor's employees – whether they receive the same training as unit workers.

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In this regard, Union vice president and business manager Hagadorn testified that based on his own observation, the LL & P crews were "inexperienced" and unable to find and repair certain electrical failures which raised safety issues for unit members. Reports were made to the Respondent which outlined these safety concerns.

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The Union needed to know who was supervising the contractor's employees to ensure that they were qualified to supervise and were trained in safety matters. In addition, if the Respondent was saving money through its use of subcontractors, the Union wanted to consider proposing that unit members receive a portion of that savings, or alternatively, if the Respondent was paying more money for the subcontractor than it was paying its employees, the Union would consider proposing an increase in unit members' wages.

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Irish testified that the letter asked for data each time the Employer engaged a contractor for each instance of subcontracting. The Union wanted the information after the subcontract was signed but 30 days before the work began. He stated that after he sent the August 29 letter, the Respondent did not claim that it did not understand what information was being requested.

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On September 16, Thomas Cammuso, the Respondent's Director of Labor Relations replied that the Employer is "willing to fully engage in effects bargaining as new subcontractors are engaged. This is not intended to modify the parties existing practices as related to storm emergencies." The letter stated that he "was in the process of gathering the requested information for the subcontracting currently taking place on the gas walking survey and will be responding to your questions." The letter concluded by requesting that the Union "suggest dates you are available for effects bargaining so we can get a meeting scheduled."

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Irish testified that he did not supply dates for effects bargaining to Cammuso because the Union did not have the information it needed to bargain effectively or to make a proposal. At hearing, Irish asked "how can you bargain over something that already took place?" referring to the fact that the Heath subcontracting work had already begun.

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Shapiro stated that, in response to the August 29 letter, the Respondent sent the Union information in September and October regarding the Heath subcontract. He testified that his comment at the February 1 meeting that he believed that his supply of information was a "done deal" was in reference to the Heath subcontract. However, he conceded that the August 29 request did not limit the information requested to just the Heath subcontract, and he "knew from the start that the Union asked for more information."

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On September 23, the Respondent further replied that the subcontractor for the mandated gas walking survey was Heath and that the project began on September 6. The letter gave the amount of the contracted payments. The reason for the use of Heath was stated as the Respondent was in "significant risk of not meeting compliance measures and dates" due to employee vacation entitlements and storm restoration work. Additional overtime for unit

employees was considered but not implemented because it would not allow that department to continue to respond to its core business, daily activities and addressing other leaks without the assistance of a subcontractor.

The letter added that no special training or required skills were needed by the contractor that would cause any safety concerns to the Employer's employees. Further, that Heath's employees are qualified and trained to classify gas leaks and complete the leak survey. The letter added that Heath provides its own direct supervisors and regular reports, and that the Respondent monitors and tracks the work to ensure that all requirements are met. Cammuso concluded that the other information requested would be provided as soon as possible.

On October 12, Cammuso sent to Irish the contract with Heath and a list of unit employees qualified and trained to perform the gas walking survey and their overtime hours for 2011 through September 30, 2011. Cammuso termed the information in this letter the "final" and "remaining responses and information" requested in your "information request of August 29."

Shapiro stated that after the Employer provided the union with the "last" of the Heath information on October 12, numerous meetings were held between October 12, 2011 and February 1, 2012, at which the topic of effects bargaining was not raised.

Union official Sondervan testified that at the February 1 meeting he told those present that the Union had not received all the information requested for the Heath subcontracting nor any notice of information regarding other subcontractors who were seen on the Respondent's property.

Sheri Lamoureux, the Respondent's vice president of human resources, replied that "there was a lot of information involved and it was a burdensome process" and that the Respondent was attempting to find other ways to provide the information. The relevance of certain information was also questioned.

Sondervan responded that the Union needed all the information on all subcontracting work. Shapiro said that he thought that "this was done" and Sondervan said that it was not and that the Employer had an obligation to give the Union the information, adding that the Union needed the information before the subcontracting took place so it could bargain about the effects of the subcontracting.

He said further that without the information, the Union could not make meaningful, "educated" proposals. "It's futile to make proposals on something we don't know what it's about." Sondervan mentioned that unit employees could be used to work overtime instead of the subcontractors who were doing the work. He told the Respondent that the information already produced was "inadequate."

At a labor-management meeting on February 1, Union international representative Jim Schlosser told those assembled that the information requested in the August 29 letter did not have to be provided to the Union in its entirety, but that the Union would request such information as needed in a case-by-case basis for each subcontractor, and that the Union would not file a charge against the Employer.

Shapiro stated that at the end of the meeting he met with Sondervan, Cammuso, Schlosser, and Lamoureux. Shapiro expressed interest in getting the requested information to the Union, but said that the Union asked for much information, and they "wondered" if that was all the information requested and "why and how they needed the information." Lamoureux said

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that some of the information could be burdensome to collect due to the amount and scope of the request.

On February 6, Sondervan sent a letter to the Respondent repudiating Schlosser's comments. Sondervan essentially stated that there had not been full compliance with the August 29 request for information. He also termed "misguided" Shapiro's statement that the Respondent's provision of some of the information requested was a "done deal," explaining that the mandated gas survey was "implemented and completed without affording the Union an opportunity to bargain over its effect on our unit members."

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On February 16, Cammuso wrote to electrical department manager Frank, stating that in response to a recent request for information from the Union, he needed a list of all subcontractors currently working on Respondent's projects which were customarily performed by unit employees. In response Cammuso was told that Heath was being used for the mandated gas surveys, and that Premier was doing stake out work. In response to a question by Frank, Cammuso replied that he needed the information for the current, 2012 contractors, and not those working in 2011.

On February 17, Frank sent Cammuso a list of contractors, including D & D, Northline, O'Connell, Wright and LL & P, with the number of their employees working for them on Respondent's subcontracts, and how long they are expected to work. He stated that the Respondent planned to use D & D, Northline all year, and Wright for many years.

On February 22, 2012, Sondervan sent a letter to the Respondent which he termed an "addendum" to the August 29 request for information. In clarification of the request, he stated that the Union demanded all information contained in the August 29 letter for each subcontractor presently employed by the Respondent engaged in bargaining unit work. The letter stated that the Union sought an opportunity to bargain over the effects to the employees "as any new subcontractors are engaged for such work." He noted that such information was needed to "determine the scope of the impact of the subcontracting and to make meaningful, well-educated proposals to ameliorate the effects of this action on" unit members, as noted in the August 29 letter.

On February 23, Cammuso sent a chart to Irish listing the existing subcontractors who are performing work "customarily performed" by unit workers. The chart listed Premier, Heath, D & D, Nortlhline, O'Connell, Wright and LL & P, their scope of work, number of contractor employees doing the work, and their supervisors. The list noted that no special training was required, and also listed the unit employees who were qualified to perform the work.

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On February 23, the Respondent and Union met. The Respondent's representatives, Shapiro and Lamoureux, stated that they wanted to begin the process of effects bargaining, Lamoureux adding that the Union had enough information to "get started." Sondervan declined, saying that all the information requested in the August 29 letter had not been provided, and the Union could not engage in such bargaining without the information. He added that the data was needed in order to make educated proposals and to understand what the Union was bargaining about.

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Shapiro asked Sondervan if he was only interested in the Heath subcontracting, and Sondervan replied that the Union received a copy of the Heath subcontract but it needed all the information set forth in the letter including all the information concerning all the contractors performing subcontracting work, adding that the information he received so far was incomplete and that he was awaiting more data. Shapiro replied that he thought the parties were "done."

Employee Craig Rode quoted Lamoureux as saying that the Employer agreed that it had to engage in effects bargaining with the Union, adding that the Employer would provide the Union with all the "missing documentation."

Shapiro conceded that Sondervan replied that effects bargaining was "premature" because the Union did not receive the information requested in its August 29 letter. Shapiro responded that the vice presidents of gas and electric and the director of electrical operations were present, all of whom could answer any questions. Sondervan repeated that such bargaining was premature and that he would not undertake such negotiations until he had all the information.

On March 6, Sondervan wrote to Cammuso advising that the Union believed that, in reference to information requested in the Union's August 29 letter, "an appropriate time period to respond is two business weeks."

In a letter dated March 20, Cammuso sent detailed information to the Union which the Union agrees satisfied the request for information set forth in its August 29 letter. The data included the subcontract for services for the seven subcontractors, the type of work being performed by the subcontractor, the number of days and hours of work the subcontractor's employees are scheduled to work and the pricing of the subcontract and the period of time for which the contract was due to run.

The information also included an acknowledgement that the Respondent's unit employees possess the skills to perform the functions that the subcontractor's employees performed, the Respondent's reason for engaging the contractor, a statement that the contractor's employees have the background and training to perform the work, and that the contractor supervises its workers.

Specifically, the Respondent's March 20 letter included the following subcontracts between it and the contractors, and information concerning the status of their work, as follows:

A contract with Wright dated June 17, 2011. Wright was currently performing certain unit work through 2012.

A contract with Northline dated November 14, 2011. Northline was currently performing certain unit work through 2012.

A contract with Premier dated December 5, 2011. Premier was currently performing certain unit work through 2012.

A contract with O'Connell dated August 11, 2010. O'Connell was currently performing certain unit work through 2012.

A contract with Michels. The contract was not received in evidence and the date it was entered into is not in the record. However, manager Frank testified that in 2010 Michels did large substation projects for the Respondent. Michels was currently performing certain unit work through 2012.

A contract with Power & Construction dated November 14, 2011. In Wright was currently performing certain unit work through 2012.

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A contract with D & D dated November 14, 2011. D&D was currently performing certain unit work through 2012.

The March 20 letter concluded by stating that the Employer "stands ready to answer questions and engage in effects bargaining." Sondervan conceded that after March 20, he did not advise the Respondent that he wanted to set a time to bargain regarding the effects of the subcontracts.

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Sondervan stated that the Respondent's notification that the seven contractors were then currently performing work was not the kind of notice and information requested in the Union's August 29 letter. That letter required 30 days notice and information in advance of any subcontracting so that the Union could engage in meaningful effects bargaining about the work to be performed.

Shapiro stated that from August 29, 2011 to the date of the hearing, one and one half years later, the Union had not requested to bargain about the effects of its subcontracting decisions, although conceding that the letter itself requests such bargaining.

# E. The Subcontracting to Wright, Northline, Premier, O'Connell, Michels, Power & Construction, and D & D

The complaint alleges that the Respondent subcontracted work to these companies without giving the Union an opportunity to bargain with it concerning the effects of such subcontracting.

As set forth in the March 20 letter, the Respondent advised the Union that subcontracts were entered into on various dates. Sondervan stated that prior to the Union's receipt of the March 20, 2012 letters, the Union had no knowledge that any of those agreements had been entered into by the Respondent with each of the subcontractors.

However, Irish testified that he knew, between August 11, 2010 and November 3, 2011, that the Employer had subcontracted work to Wright, Premier, O'Connell, Power & Construction and D & D Power. He also knew that those companies had been working for the Employer since he had seen their workers on Respondent's property. Although he knew about the presence of these subcontractors, he was not informed of any service agreement entered into by them with the Respondent, except that he received a master agreement for, perhaps, Premier.

Irish stated that the notices by the Employer that certain contractors were performing work pursuant to a subcontract were not proper notices which gave the Union an opportunity to bargain. Those notices failed to advise the Union before the work began, the Employer did not provide the requested information and always insisted that it had the unilateral right, under Article 15, to subcontract. Accordingly, the Respondent did not offer to bargain regarding the effects of subcontracting.

In mid to late 2010, the Union requested information concerning subcontracting and the Employer sent responses which included the specific information requested. For example, on November 23, 2010, Cammuso responded to the Union's information request in July, 2010 which included spreadsheets summarizing the information requested, containing information concerning those jobs in which subcontractors were presently working.

Irish testified that he knew, prior to June, 2010, that Premier was performing subcontracting work, and that it was performing such work during the period August, 2010 to

November 3, 2011. Similarly, Irish knew that LL & P, purportedly a subsidiary of Power and Construction, did work for the Employer in 2011. In May, 2011, Irish spoke to Respondent official Shapiro regarding safety concerns he had about employees of LL & P working in close proximity to unit members, and reached an "interim understanding" with him regarding that matter. Employer official Frank met with Irish concerning those safety issues where Irish asked who approved the training and qualifications of those employees. However, Frank stated that Irish made no safety proposals regarding LL & P.

Irish testified that the Union never stated that it was waiving its right to bargain over the effects of subcontracting, and the Employer never asked him if he would waive such a right. Indeed, according to Irish, there was no discussion at all with management regarding the Union's waiving such bargaining.

# **Analysis and Discussion**

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# I. The Request for Information

The complaint alleges that since about August 29, 2011, the Union requested certain relevant information from the Respondent, and that the Respondent, from August 29, 2011 to March 20, 2012 unreasonably delayed furnishing the union with the information it requested. This relates to the information requested concerning the seven subcontractors.

First, I reject the Respondent's argument that the August 29 letter referred only to the Heath subcontract. While it is true that the letter "came on the heels" of Pozzoulo's advice to Irish that the walking survey would be done by a subcontractor, the letter did not limit the request to that subcontract. The Respondent is correct in stating that following the August 29 letter and the responses to it in October, there were no requests for information on other seven subcontracts, until the February 12 meeting. However, I find, as testified by Sondervan, that the Union was not aware of those additional subcontracts. Moreover, the August 29 request was not limited to the Heath subcontract.

Shapiro's decision to submit only the Heath subcontract information, set forth above, upon receiving the Union's August 29 letter, was unjustified. He conceded that "from the start" he knew that the Union asked for more information" and that the request was not limited to the Heath subcontract.

An employer must provide requested information to a union representing its employees whenever there is a probability that such information is necessary and relevant to its representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations, but also information necessary for the administration of a collective-bargaining agreement, including information required by a labor organization to process a grievance, and for effects bargaining. *Acme Industrial*, above.

As the Board explained in *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011):

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351

U.S. 149, 152-153 (1956). Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning extra unit employees is not presumptively relevant; rather relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982). "[T]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, above at 259.

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The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act. Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978).

The sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Pfizer, Inc.,* 268 NLRB 916, 918 (1984). Further, necessity is not a guideline itself but, rather, is directly related to relevancy, and only the probability that the requested information will be of use to the labor organization need be established. "A [union] has satisfied its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information." *Shoppers Food Warehouse*, above at 259.

I reject the Respondent's argument that the August 29 letter sought information as to the Employer's *decision* to subcontract and not to the effects of its subcontracting. The letter clearly refers to "effects bargaining."

The information sought must be relevant to the Union's obligation to represent the unit and for it to engage in effects bargaining. The Union's August 29 letter contains 6 paragraphs requesting information.

The information sought includes the identity of the subcontractor, a description of the subcontracted work, its location, time period of the subcontract, planned number of subcontracted employees, a copy of the contract, the communications from and to the subcontractor regarding the performance of the work, the special training and skills required for the work possessed by unit and subcontracted employees possess in relation to the subcontracted work, and the supervisors of the subcontracted employees.

I find that all the information requested by the Union is relevant to the Union's performance of its representative duties. All the information relates to the unit employees' terms and conditions of employment as it related to subcontracted work which the employees were capable of performing. Such information is clearly relevant to the Union's efforts to engage in effects bargaining. It must be noted that the Union's August 29 letter set forth the reasons for each of its requests.

Thus, the Union stated that it needed the information so that it may understand the scope of the contract, assess the impact of the subcontract on the workload, hours and pay of the affected unit employees, assist the Union in promulgating effects bargaining proposals that will have a financial cost to the Respondent "allowing for a comparison to be made between that cost and the cost savings or cost expenditure the Respondent anticipates for the subcontract," assist the union in making future proposals for a bargaining agreement which may address company concerns so that the unit will not be diminished or kept stagnant, and to assess safety concerns for unit employees who will be working with or in proximity to the subcontractor's employees, or will be exposed to or affected by the work done by the subcontractor.

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I note that the request asks for information such as the copy of the contract with the subcontractor and all communications from and to the subcontractor regarding the performance of the work. To the extent that any requested information may be considered data "related to the relationship between the Respondent and its subcontractors ...which has been held to be not presumptively relevant," I find that the Union had a reasonable basis for believing that the information would be necessary to it in carrying out its statutory obligations. *Allison Corp.*, 330 NLRB 1363, 1367 (2000). Thus, as explained by the Union, such information was needed in order to make proposals to persuade the Employer to provide overtime for such workers rather than subcontract the work. As further explained at hearing, if the Respondent was saving money through its use of subcontractors, the Union wanted to consider proposing that unit members receive a portion of that savings, or alternatively, if the Respondent was paying more money for the subcontractor than it was paying its employees, the Union would consider proposing an increase in unit members' wages.

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Thus, by virtue of the explanations of relevance as stated by the Union in its letter and repeated during meetings with the Respondent, and testified at the hearing, it is clear that the Union sought this information in order to determine the impact of the subcontracting on the unit employees, and in an effort to be able to engage in meaningful bargaining about the effects of subcontracting on those employees. Accordingly, I find that all the information sought was relevant for those purposes.

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Specifically, on February 1, 22 and 23, Union agent Sondervan told Respondent's representatives that the information was needed to make meaningful, educated proposals. He noted on February 22, that the data was needed to propose that unit employees could be used to work overtime instead of utilizing subcontractors to perform the work. On February 22, Sondervan's letter noted that the data was needed to determine the extent of the impact of the subcontracting on the unit employees.

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As set forth above, Sondervan outlined the concerns and proposals the Union would have raised in effects bargaining had the Employer notified it, in advance, of the subcontracting. They include a proposal for overtime for unit workers; concerns for safety training of the subcontractor's employees; and an examination of staffing levels of unit employees in relation to the subcontracting.

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Union official Sondervan credibly testified that prior to the Union's receipt of the information provided on March 20, 2012, the Union had no knowledge that any of those agreements had been entered into by the Respondent with each of the subcontractors.

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While there is no *per se* rule regarding timeliness of furnishing information, the law requires a "reasonable good faith effort to respond to the request as promptly as circumstances allow." *West Penn Power Co.*, 339 NLRB 585, 587 (2003).

An employer must respond to the information request in a timely manner. "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation . . . inasmuch '[a]s the Union was entitled to the information at the time it made its initial request, [and] it was respondent's duty to furnish it as promptly as possible." *Woodland Clinic*, 331 NLRB 735, 737 (2000).

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"An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 51 (2009). The complexity and extent of the information sought, its availability, and the difficulty in retrieving the information are factors considered in determining whether an employer has responded with reasonable promptness. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

Here, the Union repeatedly informed the Respondent that it "needed the information so it could effectively administer the existing contract and engage in meaningful effects bargaining....it needed to determine to what extent the respondent's practice of subcontracting had had an impact on the bargaining unit, what future effects upon the bargaining unit could be anticipated...." *Allison Corp.*, above, at 1368.

I find that the Respondent's seven month delay, from August 29, 2011 to March 20, 2012, in furnishing the information concerning subcontracting information was unreasonable and violated Section 8(a)(5) and (1) of the Act. *Mountain View Country Club, Inc.,* 359 NLRB No. 102, slip op. at 3 (2013), where the Board found that a 3 month, 21 day delay was unreasonable and violated the Act; *Valley Inventory Service,* 295 NLRB 1163, 1166 (1989) (delay of four months); *Interstate Food Processing Corp.,* 283 NLRB 303, 306 (1987) (delay of five months).

The Respondent raises certain defenses to its failure to provide the information on a timely basis. At a meeting on February 1, vice president Lamoureux claimed that due to the extensive request, collecting the information was a "burdensome process." However, it appears that the information was easily and readily obtainable. Respondent's electrical department manager Frank testified that he "knows what work is being done now and I know what work is coming as far out as a year." Similarly, gas department manager Pozzuolo stated that he could access information on any project to determine what work would be done at any given time. It was established at the hearing that the Respondent's extensive software system keeps track of the projects that are performed by the subcontractors.

Moreover, in an email sent on February 16, 2012, Cammuso asks Frank to provide a list of all subcontractors currently working at the Employer who are contracted to perform work that is customarily performed by Union represented employees, with such information to include the contractor's name, number of contractors, a description of the purpose of the work and a timeframe for the work. The following day, Frank sent Cammuso the information requested. On February 22, gas supervisor Don Gurnett sent a spreadsheet to Cammuso containing a summary of existing subcontractors who are contracted to do work customarily done by Union employees.

In addition, the Union addressed the Respondent's concern as to the burdensomeness of the request in its February 22 letter, offering to amend its request to ameliorate such concerns if the Employer could "elaborate on the specific items to which this applies."

The Respondent also asserts that the Union excused it from providing all the information requested in its August 29 letter by Union agent Schlosser's comments at the February 1

meeting. However, Union official Sondervan repudiated such comments in his February 6 letter, and thereafter continued to demand all of the information requested in its letter. Indeed, Shapiro testified that at the February 1 meeting, Sondervan was "very clear" that the Union wanted information for all the subcontractors.

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I accordingly find and conclude, that by unreasonably delaying, from August 29, 2011 to March 20, 2012, in providing the information requested by the Union in its August 29, 2011 letter, the Respondent violated Section 8(a)(5) and (1) of the Act.

# II. The Alleged Refusal to Bargain Over the Effects of the Subcontracting

The complaint alleges that on about March 20, 2012, before which the Union did not know and could not have known, it was put on notice that at various times from about August 11, 2010 to about December 5, 2011, Respondent subcontracted bargaining unit work to seven named contractors, and that on about August 30, 2011, it subcontracted bargaining unit work to Heath. It is alleged that the Respondent subcontracted such work without affording the Union an opportunity to bargain with the Respondent with respect to the effects of such conduct.

It is true that, for years, the Respondent utilized subcontractors to perform gas and electric work similar to that which unit employees did prior to the subcontracting involved here. However, the question is not whether the Respondent had the right to subcontract in those instances. It did.<sup>4</sup> The question is whether the Respondent failed to bargain about the effects of those subcontracts for which it had a bargaining obligation.

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An employer's bargaining obligation includes a duty to bargain about the effects on unit employees of management decisions, which are not subject to bargaining obligations, and such bargaining "must be conducted in a meaningful manner and at a meaningful time." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). As a general matter, an employer must bargain over the effects on unit employees of decisions involving non-mandatory subjects, whenever these effects cause "material, substantial, and significant" changes to unit working conditions. *The Bohemian Club*, 351 NLRB 1065, 1066 (2007).

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It is important to emphasize that although the Union promptly requested effects bargaining over the Respondent's subcontracting, bargaining never occurred in a "meaningful manner." First, the Respondent's ongoing failure to fulfill the Union's information request precluded meaningful bargaining. *Miami Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995) where the Board held that the "union is not required to begin bargaining at a time when relevant information is being unlawfully withheld." *Southern Mail, Inc.*, 345 NLRB 644, 647-648 (2005).

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Further, It is essential to note that what is required is "preimplementation notice" of the subcontracting. "Once the Respondent made the decision to [subcontract work], the time was ripe for effects bargaining. The Respondent then had a 'duty to give preimplementation notice to the union' to allow for meaningful effects bargaining." *Allison Corp.*, above at 1366. The Board found in that case that by failing to give the union prior notice and an opportunity to engage in

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<sup>&</sup>lt;sup>4</sup> In this regard, I reject the Union's argument in its brief that the Union did not contractually waive its right to bargain about the decision to subcontract. That theory was not embraced by the General Counsel at hearing or in his brief. A charging party cannot enlarge upon or change the General Counsel's theory of the complaint. *United Nurses and Allied Professionals (Kent Hospital*, 359 NLRB No. 42, slip op. at 2, fn. 4 (2012) citing *Penntech Papers*, 263 NLRB 264, 265 (1982).

meaningful negotiations regarding the effects of its lawful decision to subcontract unit work, the respondent violated Section 8(a)(5) and (1) of the Act. *Public Service Co.*, 312 NLRB 459, 460 (1993); *Los Angeles Soap Co.*, 300 NLRB 289, 289 fn. 1 (1990); *Willamette Tug & Barge Co.*, 300 NLRB 282, 282-283 (1990).

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The Board has also held that notification to the union "requires that bargaining occur sufficiently before actual implementation so that the union is not confronted at the bargaining table with a *fait accompli.*" *Woodland Clinic*, 331 NLRB 735, 738 (2000); *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

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Regarding the Heath subcontract, Pozzuolo determined in August, 2011 that unit employees could not complete the mandated gas walking survey on time, and that a subcontractor would be utilized to perform that work. On about August 26, Pozzuolo advised Union president Irish that the Respondent would perform the work with a subcontractor. In response to being informed of the subcontract, on August 29, the Union then made a request for information demanding "effects bargaining information over each instance of subcontracting of unit work." The demand included a statement that the Union required "a minimum advance notification period of 30 days...."

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On August 30, Pozzuolo agreed to a pricing arrangement with Heath. He advised Irish that the subcontractor would begin the work after September 1.

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Instead of bargaining over the effects of the Heath subcontract, the Respondent authorized the work to begin on September 6. The Respondent's letter of September 16 to Irish stated that it was in the process of gathering information on the subcontracting "currently taking place on the gas walking survey and will be responding to your questions." Although the letter invited the Union to engage in effects bargaining, it did not identify the subcontractor or give complete information about the subcontract. Importantly, the decision to subcontract to Heath had already been made and, as of September 6, the work had already begun. Accordingly, preimplementation effects bargaining had not taken place notwithstanding the Union's August 29 request for such bargaining.

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On September 23, Cammuso made a partial response to the Union's request by stating that Heath was the subcontractor and setting forth the contract itself and the nature and reason for the subcontract, the hours, contracted payments, the fact that no special training or skills needed by the contractor, and that Heath provides its own supervision.

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The Respondent argues that it should be excused from providing advance notice of the subcontract because of a "natural disaster necessitating a state of emergency" due to two hurricanes. I reject that argument. Even assuming that the work was necessitated by the storms, notice could have been given to the Union at the time the decision was made to subcontract. Rather, the stated reason for the decision to subcontract to Heath was because it was determined that unit employees could not complete the survey on time. It does not appear that the work was subcontracted because of the storms or damage resulting from them. It should be noted that employee Craig Rode testified that, at the February 23 meeting, the Employer did not say that it could not engage in effects bargaining or provide the requested information due to the storm.

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Further, I reject Shapiro's testimony that the delay in supplying the information was justified by his personal involvement in two storms which impacted the Employer's operations. As a result of the storms he was personally occupied with damage repair. However, he was not personally involved in the collection of the data which he delegated to Cammuso, and it was

Cammuso who directed his subordinates to amass the information requested. Further, Shapiro conceded that Cammuso, who was given the responsibility to assemble the response, was not working on the storms with him, but was in his (Cammuso's) office.

Regarding the subcontracting to the seven contractors, the Respondent's seven month delay in notifying the Union that it had entered into and implemented subcontracting projects violated its obligation to give preimplementation notice to the Union. Thus, there was no timely notification to the Union of the subcontracting which would have permitted good-faith bargaining to occur before the actual implementation of the subcontracts. *Woodland*, above, at 738.

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I credit Sondervan's testimony that prior to the Union's receipt of the March 20, 2012 letters, the Union had no knowledge that any of those agreements had been entered into by the Respondent with each of the seven subcontractors.

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The Respondent did not satisfy its obligation under the Act by providing those documents which contained information as to jobs already in progress. What was sought, and what was required under the Act, was that the Employer provide preimplementation notice of subcontracting work.

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As set forth above, the subcontracting must cause material, substantial and significant changes to unit working conditions. Here, there was evidence of a reduction in the size of the unit - employees had left their employment and had not been replaced for about ten years. At the same time, their work had been let to subcontractors. In this regard, electrical operations manager Frank testified that in the past five to seven years during which time 15 employees retired, he was not permitted to hire any new employees to replace them. At the same time, the workload increased. It was the Respondent's policy to employ only a "core" group of unit employees and supplement their work with an "increased use" of subcontractors. Frank noted that with fewer unit employees the only way the additional work was completed was by the use of subcontractors.

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Similarly, Pozzuolo was prohibited from hiring employees for the gas department for about the past ten years. The more than ten employees who retired from the gas department in the last five years had not been replaced. This policy changed at the time of the hearing when 16 workers were in the process of being hired.

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It therefore has been proven that "material, substantial, and significant" changes to unit working conditions have taken place because of the subcontracting of unit work to subcontractors.

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Accordingly, it follows that had the Union been timely and properly informed of the plans to subcontract and the existence of the seven subcontracts before they were implemented, could have engaged in effective, meaningful effects bargaining concerning the impact of such contracting on unit employees.

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As set forth above, Union witnesses outlined the areas in which such bargaining could have taken place. Such topics could have included the use of overtime work which would have meant more work for unit employees and therefore preclude the use of subcontractors. The evidence established that unit employees were available for such overtime work and would have worked overtime if requested. However, the Respondent appears to have foreclosed this possibility since, as testified by manager Frank, the Employer's policy was to authorize overtime only in emergencies. See *Hospital San Cristobal*, 358 NLRB No. 89, slip op. at 11, fn. 26 (2012), where it was noted that union members have an interest in subcontracting decisions because

work identified for subcontracting provides bargaining unit members with the opportunity to obtain extra shifts (possibly at higher wage rates that the employer might pay for overtime or for working undesirable hours), or expand or maintain the size of the bargaining unit with newly hired employees. Further, it is clear that unit employees were qualified to perform the work done by the contractors.

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It must be noted that Pozzuolo conceded that, in subcontracting to Heath because it was determined that unit employees would not be able to complete the survey on time, the Respondent could have had more unit employees working overtime earlier in the year to ensure that the work would be completed. However, he stated that employees could have worked overtime only if the Employer was not concerned with its budget. And, of course, it was the Employer's policy at the time not add to the budget by hiring anyone, and not authorize overtime except in emergencies.

Another topic for bargaining was the training of the subcontractor's employees. There was evidence that the subcontractors made errors in their work which were corrected by unit workers. Union witnesses testified that such errors could cause danger and injury to unit employees.

When the Respondent provided the contracts to the Union on March 20, it had already entered into those contracts with the seven contractors. Thus, there can be no dispute that the Respondent entered into master service agreements and subcontracted unit work to the seven contractors without providing the Union with preimplementation notice and an opportunity to bargain over the effects of those contracts on unit employees.

It should be noted, further, that five of the seven subcontracts, Northline, Premier, O'Connell, Power & Construction, D & D, and Michels were entered into after the Union's August 29 request for information.<sup>5</sup> I accordingly find and conclude that, as alleged, the Respondent entered into the Heath subcontract and subcontracts with the seven contractors without affording the Union an opportunity to bargain with it as to the effects of those subcontracts on unit employees.

# III. The Respondent's Defenses

The Respondent contends that the Union waived its right to engage in effects bargaining.

First, I have credited the testimony of Flanagan, the Union's chief negotiator during the 2003 and 2008 contract negotiations, in which he denied that the Union, during the 2008 negotiations, the Union stated that it was waiving its right to bargain regarding the effects of subcontracting.

In order to establish the waiver of a statutory right to bargain over changes in terms and conditions of employment, the party asserting waiver must establish that the right has been clearly and unmistakably relinquished. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1981); *Provena St. Joseph Medical Center*, 350 NLRB 808, 811-812 (2007). Waivers may be found in the express language of the collective bargaining agreement, or can be inferred from bargaining history, past practice, or a combination thereof. *Johnson-Bateman Co.*, 295 NLRB 180, 185

<sup>&</sup>lt;sup>5</sup> Although the Michels contract was not received in evidence, I accept the testimony of manager Frank that Michels worked for the Respondent in 2010.

(1989). The Board requires, however, that a matter sought to be the subject of a waiver be consciously explored during bargaining, and that a union unmistakably waived its interest in the subject.

First, the language of the parties' contract, although it gives the Respondent the right to unilaterally subcontract unit work, is silent as to effects bargaining. It does not expressly classify effects bargaining as a waived bargaining subject. *Allison Corp.*, above, at 1365.

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The Respondent's argument that the Union implicitly waived its right to engage in effects bargaining because it waived its right to bargain about the decision to subcontract must fall. Its argument that effects bargaining is not required because the effects are inherent in the decision to subcontract work is contrary to the established principle that a union's waiver of its right to bargain about a decision to subcontract does not affect its right to bargain about the effects of that decision. In *Allison Corp.*, above, at 1365, the Board stated that "while a contact clause may constitute a waiver of a bargaining right, it does not automatically follow that the same contract clause waives a party's right to bargain over the effects of the matter in issue." Indeed, here, the contract provides only that the Employer "may subcontract" work. It does not provide that it has the exclusive right to subcontract as the contract in *Allison Corp.* provided.

I reject the Respondent further argument that the contract itself prescribes the only effects bargaining that may take place. Article 15 states that employer may subcontract work, and that a unit employee laid off during the contract shall be recalled if the Company contracts out work that is normally and customarily performed by the classification such employee was laid off from.

It is true that this clause provides one remedy for a laid off worker if such layoff was due to the subcontracting of his or her work. However, it does not appear that any employee was laid off due to the subcontracting. Moreover, the clause does not state that it is the only remedy. Good faith bargaining requires that discussions take place with the Union concerning its views of the effects of the subcontracting on employees who were not laid off.

Second, the Respondent's bargaining activity demonstrates that the Union did not waive its effects bargaining rights. As set forth above, the Respondent expressly acknowledged its obligation to engage in effects bargaining. Indeed, Shapiro testified generally that he was "consistently willing" to engage in effects bargaining with the Union, and that at the February 23 meeting, he advised the Union that he wanted to engage in effects bargaining about the subcontracting. Lamoureux was quoted as saying at the meeting that she wanted to get started with such bargaining. Further, in his letters transmitting the Master Services Procurement Agreements in March, 2012, Cammuso wrote that "we ... stand ready to answer questions and engage in effects bargaining."

Clearly, if the Respondent believed that the Union had waived its right to engage in effects bargaining in past contract negotiations, its representatives would not have repeatedly expressed a desire to engage in such bargaining.

In addition, no waiver may be found since the Respondent implemented the seven subcontracts before notifying the Union about them, thereby presenting the Union with a *fait accompli* at a time when the Union no longer retained any bargaining power over the subcontracts. *Los Angeles Soap Co.*, 300 NLRB 289, 296 (1990).

The Respondent argues that, during contract negotiations the Union bargained about the same subjects it now declares that the Respondent should have bargained about in effects

bargaining, for example overtime and safety issues. The Employer argues that the Union thereby waived any right to require effects bargaining because it bargaining about those subjects but was not able to have them included in past collective-bargaining agreements.

However, although the Union may have discussed such topics during prior contract negotiations, the Respondent has not established that the Union made a "clear and unequivocal waiver" of its right to engage in effects bargaining. For example, there was testimony that during bargaining for a renewal agreement, the parties sought to agree as to the current work rules and practices.

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One such rule the Union sought was that subcontractors could not work side-by-side with unit employees. The parties agreed that that was an existing work rule but could not agree on its inclusion in a list of existing work rules set forth in a work rules memo. In addition, there was testimony that Irish and Frank discussed safety issues with Frank and they reached an "interim understanding" regarding that matter. However, that discussion did not foreclose the Union from seeking further negotiations with the Respondent on safety matters as requested in the August 29 letter. Moreover, notwithstanding these arguments, the Respondent's representatives did not raise these issues during bargaining. Rather, they broadly offered to engage in effects bargaining with the Union.

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I find that the Respondent's provision of documents advising the Union of jobs that were already in progress only proves the violation. It is preimplementation information that is required in order to give the Union a meaningful and effective time to bargain in order to present its position as to the effect on the unit of the subcontracting. Although the Respondent stated that it was willing to meet and discuss the information supplied, such data was not provided in a timely manner in which a discussion could be fruitful.

The Respondent also argues that the Union waived its right to bargain over the effects of subcontracting by not requesting such bargaining when the Employer subcontracted work in the past. The Board has held that "a union's past practice of permitting unilateral changes or contact modifications does not constitute a waiver of the union's right to bargain over such changes or to insist upon adherence to the contract." *E.R. Steubner, Inc.*, 313 NLRB 459, 459 (1993).

In this regard, the Employer contends that it contracted with these subcontractors in the past and therefore the Union had notice that those companies had engaged in subcontracting with the Respondent.

It is true, as Irish testified, that he was aware that certain of these subcontractors had worked for the Respondent prior to the times at issue. Nevertheless the Union was entitled to engage in effects bargaining with respect to each subcontract that was entered into. As set forth above, a purchase order for each specific project is generated for the work to be performed. Indeed, the Master Services Procurement Agreements entered into with the seven subcontractors stated that "each purchase order processed in accordance with [this Contract] constitutes a separate and distinct contract for the particular services set forth in the purchase order...."

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In connection with its decision to subcontract each piece of work, the Respondent informed the Union when it provided the master service agreements in March, 2012, that it "balances the work between internal and external resources based on numerous factors including available staffing, the nature of the work, and whether the work is peak work." Your letter mentions that this information 'will assist the Union in making future proposal.' The Company welcomes any such proposal or any ideas the Union may have for more effectively

meeting business needs."

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In addition, "a mere failure to invoke bargaining rights over particular changes in the past does not represent a waiver of such rights over other changes in the future." *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 (1997.

Accordingly, separate transactions were completed for each subcontract. The Respondent was obligated to engage in effects bargaining with respect to each subcontract. Its letter seemed to welcome the Union's input into such decisionmaking but by failing to involve the Union prior to its implementation of the contracts the Respondent violated its obligation to engage in meaningful effects bargaining.

I find and conclude that the Respondent has not established that the Union "clearly and unmistakably waived" its right to bargain about the effects of the Employer's decision to subcontract unit work.

The Respondent also contends that the complaint must be dismissed because the charges were not filed within the statutory six-month 10(b) period. I do not agree. It is settled, as set forth in *Art's Way Vessels, Inc.*, 355 NLRB 1142, 1147 (2010), that "the 10(b) period does not begin to run until the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. The notice, 'whether actual or constructive, must be clear and unequivocal' to start the limitations period running. It is well established that the party asserting the 10(b) defense bears the burden of showing such notice."

Here, the Respondent has not shown, as it could not, that the Union had received any type of notice that the specific subcontracts would be entered into between the Employer and the subcontracting companies at issue here. The fact that the Union was aware of prior subcontracting projects cannot constitute adequate, advance notice as to these eight specific subcontracting jobs.

The Respondent asserts that the Union waived its right to bargain regarding the effects of subcontracting due to the history of subcontracting. As set forth above, the Union filed two charges in December, 2010, alleging that the Respondent failed to bargain about the effects of subcontracting on unit employees. Clearly, the Union, in filing the charges demonstrated that, in the past, it did not waive its right to bargain with the Employer about the effects of subcontracting.

The Respondent argues that it invited the Union to engage in effects bargaining over the subcontracting several times during the negotiations but the Union unlawfully refused, thereby excusing the Employer from this alleged violation. I do not agree. In *Miami Rivet of Puerto Rico*, above, at 772, the Board held that an employer's refusal to provide certain information "in a timely fashion removed the possibility of fruitful effects bargaining. ... The Union is not required to begin bargaining at a time when relevant information is being unlawfully withheld....The Respondent's unlawful refusal to provide relevant information ... privileged the Union's refusal to meet for effects bargaining. ... The Union's failure to meet without the relevant ... information did not constitute a waiver of its right to engage in effects bargaining." I accordingly find and conclude that the Union was justified in refusing to engage in effects bargaining until the Respondent provided it with all the requested information.

Moreover, the Union's repeated requests that the Respondent bargain with it about the effects of the subcontracting is evidence that the Union did not waive its right to bargain. *East Cost Steel, Inc.,* 317 NLRB 842, 846 (1995).

Indeed, while the Union continued to meet with the Respondent, it continued to argue that the Respondent's failure to provide the requested information prevented it from engaging in meaningful effects bargaining. Thus, the Union made clear that meaningful discussions and its ability to make educated proposals hinged on receipt of the requested information.

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The Union's demand for the requested information was a focus of and an issue of contention at each of the meetings between the parties. The Union made clear, at the meetings and at the hearing, that its ability to make proposals and its evaluation of the effects on the employees of the subcontracting was negatively impacted by its failure to receive the requested information from the Respondent. The record is clear that the Respondent's unlawful failure to provide the requested information weighed heavily in the balance for the Union as it participated in the meetings. The record of the negotiations requires the conclusion that the Employer's failure to provide the requested information undermined and tainted any attempt at effects bargaining.

I accordingly find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to give timely notice to the Union, and failing to afford the Union an opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining unit work.

#### **Conclusions of Law**

- 1.Respondent, Rochester Gas & Electric Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2.Local Union 36, International Brotherhood of Electrical Workers, AFL-CIOI, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By failing or refusing to bargain with the Union by failing to timely furnish the Union with requested information set forth in paragraphs 1, 5, and 6 of its letter of August 29, 2011, which information is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the following employees in the unit, the Respondent violated Section 8(a)(5) and (1) of the Act:

All employees included in paragraph 9(E) of the Memorandum of Agreement effective June 1, 2008, specifically those designated in the NLRB certification dated April 11, 2003, in Case No. 3-CB-11307, and excluding all other employees and all supervisors as defined in the National Labor Relations Act.

4. By failing to give timely notice to the Union, and failing to afford the Union an opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining unit work, the Respondent violated Section 8(a)(1) and (5) of the Act.

# The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I note that the Union agrees that it has received the information set forth in August 29 letter which is the basis for the alleged violation.

To remedy the Respondent's unlawful failure to bargain in good faith with the Union over the effects of the Respondent's decision to subcontract bargaining unit work, the Respondent shall be ordered to bargain with the Union, on request, about the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when such bargaining may have been effective in securing overtime or other work opportunities.

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Accordingly, it is necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany the bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. I shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

When the purpose and rationale of the *Transmarine* is considered, this case is one for which the *Transmarine* remedy was designed. As I have found, by failing to provide the information it was required to provide to the Union, the Respondent did not satisfy its duty to bargain, to the disadvantage of the Union and to the disadvantage of the effects bargaining process. It must be ordered to engage in effects bargaining, but a mere bargaining order is insufficient. The circumstances make the imposition of a *Transmarine* remedy appropriate. *Piggly Wiggly Midwest*, LLC, 357 NLRB No. 191, slip op. at 23 (2012).

The Board has granted *Transmarine* remedies in cases where the Respondent's actions have not resulted in lost jobs or reduced wages. *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1042 (1990) where the Board stated that it is not necessary to decide whether such a remedy should be imposed regardless of loss, but that remedy is appropriate because the union "might have secured additional benefits for employees had the Respondent engaged in timely effects bargaining." *Live Oak*, above, at 1040.

The Transmarine remedy will apply to the unit employees in classifications qualified to perform work that had been subcontracted. Specifically, I shall order the Respondent to pay such employees as a result of its failure to engage in effects bargaining the amount of overtime pay the employees would have earned but for the subcontracting of work they were qualified to perform, from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on the effects of the subcontracting; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. The sum paid to each employee shall not exceed the value of his or her wages and the wages paid to the subcontractors' employees. However, in no event shall the sum paid to any employee be less than the unit employees' wages for a 2-week period. The amounts due shall be computed in accordance with Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate employees for any adverse tax consequences of receiving lump-sum backpay awards covering more than 1 calendar year. Latino Express, Inc., 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

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The Respondent, Rochester Gas & Electric Corporation, Rochester, NY, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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- (a) Failing or refusing to bargain with the Union by failing to timely furnish the Union with information which is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the following employees in the unit set forth below.
- (b) Failing to give timely notice to the Union, and failing to afford the Union an opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining unit work.
  - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
    - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effects of the Respondent's decision to subcontract work performed by members of the collective-bargaining unit, and if an understanding is reached, embody the understanding in a signed agreement:

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All employees included in paragraph 9(E) of the Memorandum of Agreement effective June 1, 2008, specifically those designated in the NLRB certification dated April 11, 2003, in Case No. 3-CB-11307, and excluding all other employees and all supervisors as defined in the National Labor Relations Act.

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- (b) Pay each member of the collective-bargaining unit the amount that they would have earned but for the subcontracting of work they were qualified to perform, for the period of time set forth in the Remedy section of this Decision.
- (c) Furnish the Union with relevant which information is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the following employees in the unit set forth above.
  - (d) Give timely notice to the Union and afford the Union a meaningful opportunity to bargain with it over the effects of the Respondent's decision to subcontract bargaining work.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional

<sup>&</sup>lt;sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 8, 2014

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Steven Davis
Administrative Law Judge

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<sup>&</sup>lt;sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### **APPENDIX**

#### **NOTICE TO EMPLOYEES**

# Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to bargain with the Union by failing to timely furnish the Union with information which is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the employees in the collective-bargaining unit set forth below.

WE WILL NOT fail to give timely notice to the Union and afford the Union an opportunity to bargain with us over the effects of our decision to subcontract bargaining work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effects of our decision to subcontract work performed by members of the collective-bargaining unit, and if an understanding is reached, embody the understanding in a signed agreement:

All employees included in paragraph 9(E) of the Memorandum of Agreement effective June 1, 2008, specifically those designated in the NLRB certification dated April 11, 2003, in Case No. 3-CB-11307, and excluding all other employees and all supervisors as defined in the National Labor Relations Act.

WE WILL pay members of the collective-bargaining unit limited backpay, plus interest for the period of time set forth in this Decision.

WE WILL timely furnish the Union with information which is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the following employees in the unit set forth above.

WE WILL give timely notice to the Union and afford the Union an opportunity to bargain with us over the effects of our decision to subcontract bargaining work.

	_	ROCHESTER GAS & ELECTRIC CORPORATION (Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue Suite 630 Buffalo, New York 14202 Hours: 8:30 a.m. to 5 p.m. 716-551-4931.

### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.